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4 UNITED STATES DISTRICT COURT  
5 EASTERN DISTRICT OF WASHINGTON

6 STACI JO VOLLENDORFF, )  
7 Plaintiff, ) No. CV-09-0060-JPH  
8 v. ) ORDER GRANTING DEFENDANT'S  
9 MICHAEL J. ASTRUE, Commissioner ) MOTION FOR SUMMARY JUDGMENT  
10 of Social Security, )  
11 Defendant. )  
12 )

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13 BEFORE THE COURT are cross-motions for summary judgment noted  
14 for hearing without oral argument on November 20, 2009. (Ct.  
15 Recs. 12, 16). Attorney Gary R. Penar represents plaintiff;  
16 Special Assistant United States Attorney David J. Burdett  
17 represents the Commissioner of Social Security ("Commissioner").  
18 The parties have consented to proceed before a magistrate judge.  
19 (Ct. Rec. 7.) After reviewing the administrative record and the  
20 briefs filed by the parties, the court **GRANTS** Defendant's Motion  
21 for Summary Judgment (Ct. Rec. 16) and **DENIES** Plaintiff's Motion  
22 for Summary Judgment (Ct. Rec. 12.)

23 **JURISDICTION**

24 Plaintiff protectively filed applications for disability  
25 insurance benefits (DIB) and supplemental security income (SSI) on  
26 August 3, 2006, alleging onset as of November 1, 2004. (Tr. 92-  
27 96, 97-99, 110.) The applications were denied initially and on  
28

1 reconsideration. (Tr. 66-69, 71-73, 74-75.)

2 A hearing was held July 10, 2008, before Administrative Law  
3 Judge (ALJ) Paul L. Gaughen. Plaintiff, represented by counsel,  
4 psychological expert W. Scott Mabee, Ph.D., and vocational expert  
5 Deborah N. Lapoint testified. (Tr. 32-61.) On September 3, 2008,  
6 the ALJ issued his decision (Tr. 10-29) finding if plaintiff  
7 stopped abusing substances she would no longer be disabled,  
8 meaning drug and/or alcohol abuse (DAA) is a contributing factor  
9 material to the disability determination (Tr. 29). Accordingly,  
10 the ALJ found plaintiff not disabled as defined by the Act (Tr.  
11 29). On January 9, 2009, the Appeals Council denied review (Tr.  
12 1-3). Therefore, the ALJ's decision became the final decision of  
13 the Commissioner, which is appealable to the district court  
14 pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for  
15 judicial review pursuant to 42 U.S.C. § 405(g) on March 5, 2009  
16 (Ct. Recs. 1,4).

#### 17 **STATEMENT OF FACTS**

18 The facts have been presented in the administrative hearing  
19 transcript, the ALJ's decision, the briefs of both parties, and  
20 are summarized here.

21 Plaintiff was 34 years old when she filed her applications  
22 for benefits (Tr. 27.) She has a high school education and one  
23 and a half years of college but no degree. (Tr. 42-43, 287.)  
24 Plaintiff has worked as a secretary, insurance clerk, food service  
25 manager, cashier, and passenger booking clerk. (Tr. 54-55, 123,  
26 129.) She alleges disability onset as of November 1, 2004, due  
27 to depression, anxiety, carpal tunnel syndrome, chemical  
28 dependency, post traumatic stress disorder (PTSD), a broken

1 tailbone, Grave's disease, endometriosis, and high blood pressure  
2 (Tr. 122).

### 3 SEQUENTIAL EVALUATION PROCESS

4 The Social Security Act (the "Act") defines "disability"  
5 as the "inability to engage in any substantial gainful activity by  
6 reason of any medically determinable physical or mental impairment  
7 which can be expected to result in death or which has lasted or  
8 can be expected to last for a continuous period of not less than  
9 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The  
10 Act also provides that a Plaintiff shall be determined to be under  
11 a disability only if any impairments are of such severity that a  
12 plaintiff is not only unable to do previous work but cannot,  
13 considering plaintiff's age, education and work experiences,  
14 engage in any other substantial gainful work which exists in the  
15 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
16 Thus, the definition of disability consists of both medical and  
17 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
18 (9<sup>th</sup> Cir. 2001).

19 The Commissioner has established a five-step sequential  
20 evaluation process for determining whether a person is disabled.  
21 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
22 is engaged in substantial gainful activities. If so, benefits are  
23 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If  
24 not, the decision maker proceeds to step two, which determines  
25 whether plaintiff has a medically severe impairment or combination  
26 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
27 416.920(a)(4)(ii).

28 If plaintiff does not have a severe impairment or combination

1 of impairments, the disability claim is denied. If the impairment  
2 is severe, the evaluation proceeds to the third step, which  
3 compares plaintiff's impairment with a number of listed  
4 impairments acknowledged by the Commissioner to be so severe as to  
5 preclude substantial gainful activity. 20 C.F.R. §§  
6 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
7 App. 1. If the impairment meets or equals one of the listed  
8 impairments, plaintiff is conclusively presumed to be disabled.  
9 If the impairment is not one conclusively presumed to be  
10 disabling, the evaluation proceeds to the fourth step, which  
11 determines whether the impairment prevents plaintiff from  
12 performing work which was performed in the past. If a plaintiff  
13 is able to perform previous work, that Plaintiff is deemed not  
14 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).  
15 At this step, plaintiff's residual functional capacity ("RFC")  
16 assessment is considered. If plaintiff cannot perform this work,  
17 the fifth and final step in the process determines whether  
18 plaintiff is able to perform other work in the national economy in  
19 view of plaintiff's residual functional capacity, age, education  
20 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
21 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

22 The initial burden of proof rests upon plaintiff to establish  
23 a *prima facie* case of entitlement to disability benefits.  
24 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
25 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
26 met once plaintiff establishes that a physical or mental  
27 impairment prevents the performance of previous work. The burden  
28 then shifts, at step five, to the Commissioner to show that (1)

1 plaintiff can perform other substantial gainful activity and (2) a  
2 "significant number of jobs exist in the national economy" which  
3 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
4 Cir. 1984).

5 Plaintiff has the burden of showing that drug and alcohol  
6 addiction (DAA) is not a contributing factor material to  
7 disability. *Ball v. Massanari*, 254 F.3d 817, 823 (9<sup>th</sup> Cir. 2001).  
8 The Social Security Act bars payment of benefits when drug  
9 addiction and/or alcoholism is a contributing factor material to a  
10 disability claim. 42 U.S.C. §§ 423 (d)(2)(C) and 1382(a)(3)(J);  
11 *Bustamante v. Massanari*, 262 F.3d 949 (9<sup>th</sup> Cir. 2001); *Sousa v.*  
12 *Callahan*, 143 F.3d 1240, 1245 (9<sup>th</sup> Cir. 1998). If there is  
13 evidence of DAA and the individual succeeds in proving disability,  
14 the Commissioner must determine whether DAA is material to the  
15 determination of disability. 20 C.F.R. §§ 404.1535 and 416.935.  
16 If an ALJ finds that the claimant is not disabled, then the  
17 claimant is not entitled to benefits and there is no need to  
18 proceed with the analysis to determine whether substance abuse is  
19 a contributing factor material to disability. However, if the ALJ  
20 finds that the claimant is disabled, then the ALJ must proceed to  
21 determine if the claimant would be disabled if he or she stopped  
22 using alcohol or drugs.

#### 23 STANDARD OF REVIEW

24 Congress has provided a limited scope of judicial review of a  
25 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
26 the Commissioner's decision, made through an ALJ, when the  
27 determination is not based on legal error and is supported by  
28 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995

(9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999). "The [Commissioner's] determination that a plaintiff is not disabled will be upheld if the findings of fact are supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On review, the Court considers the record as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

It is the role of the trier of fact, not this Court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the Court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Secretary of Health and Human Services*, 839

1 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial  
2 evidence to support the administrative findings, or if there is  
3 conflicting evidence that will support a finding of either  
4 disability or nondisability, the finding of the Commissioner is  
5 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
6 1987).

#### 7 **ALJ'S FINDINGS**

8 At the outset, the ALJ found plaintiff met the DIB  
9 requirements through December 31, 2009. (Tr. 10, 12, 110.) At  
10 step one, the ALJ found plaintiff has not engaged in substantial  
11 gainful activity. (Tr. 13.) At steps two and three, the ALJ  
12 found plaintiff suffers from major depressive disorder, anxiety  
13 disorder with elements of post-traumatic stress disorder (PTSD),  
14 methamphetamine use/abuse, carpal tunnel syndrome by history  
15 (worse on the right with symptoms on the left possibly related to  
16 reflex sympathetic dystrophy), degenerative disc disease, and  
17 remote history of coccyx fracture, impairments that are severe but  
18 which do not alone or combination meet or medically equal a  
19 Listing impairment. (Tr. 13, 22.) The ALJ found plaintiff less  
20 than completely credible. (Tr. 25-26.) At step four, relying on  
21 the VE, the ALJ found plaintiff's RFC for a range of light work  
22 when DAA is included prevents performing her past relevant work.  
23 (Tr. 26.) At step five, again relying on the vocational expert,  
24 the ALJ found when DAA is included, there are no jobs plaintiff  
25 could perform. He found plaintiff disabled at step five when DAA  
26 is included. (Tr. 27.) The ALJ continued the DAA analysis as  
27 required. He found if plaintiff stopped abusing substances, she  
28 would have the RFC to perform past relevant work as a secretary,

1 insurance clerk, and administrative clerk. (Tr. 28.) Accordingly,  
2 the ALJ found that plaintiff is not disabled as defined by the  
3 Social Security Act. (Tr. 29.)

#### 4 **ISSUES**

5 Plaintiff contends the Commissioner erred as a matter of law  
6 by failing to properly weigh the medical and lay evidence, and  
7 this in turn led to an incomplete assessment of plaintiff's RFC.  
8 Plaintiff contends the ALJ erroneously relied on the VE's  
9 testimony, "arguabl[y]" in conflict with the DOT, without asking  
10 for an explanation. (Ct. Rec. 13 at 23, 30, 33, 38-40.) The  
11 Commissioner asks the Court to affirm the decision because, he  
12 asserts, it is supported by the evidence and free of error. (Ct.  
13 Rec. 16-2 at 12).

#### 14 **DISCUSSION**

##### 15 **A. Weighing medical evidence**

16 In social security proceedings, the claimant must prove the  
17 existence of a physical or mental impairment by providing medical  
18 evidence consisting of signs, symptoms, and laboratory findings;  
19 the claimant's own statement of symptoms alone will not suffice.  
20 20 C.F.R. § 416.908. The effects of all symptoms must be  
21 evaluated on the basis of a medically determinable impairment  
22 which can be shown to be the cause of the symptoms. 20 C.F.R. §  
23 416.929. Once medical evidence of an underlying impairment has  
24 been shown, medical findings are not required to support the  
25 alleged severity of symptoms. *Bunnell v. Sullivan*, 947, F. 2d  
26 341, 345 (9<sup>th</sup> Cr. 1991).

27 A treating physician's opinion is given special weight  
28 because of familiarity with the claimant and the claimant's

1 physical condition. *Fair v. Bowen*, 885 F. 2d 597, 604-05 (9<sup>th</sup>  
2 Cir. 1989). However, the treating physician's opinion is not  
3 "necessarily conclusive as to either a physical condition or the  
4 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
5 751 (9<sup>th</sup> Cir. 1989) (citations omitted). More weight is given to  
6 a treating physician than an examining physician. *Lester v.*  
7 *Cater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996). Correspondingly, more  
8 weight is given to the opinions of treating and examining  
9 physicians than to nonexamining physicians. *Benecke v. Barnhart*,  
10 379 F. 3d 587, 592 (9<sup>th</sup> Cir. 2004). If the treating or examining  
11 physician's opinions are not contradicted, they can be rejected  
12 only with clear and convincing reasons. *Lester*, 81 F. 3d at 830.  
13 If contradicted, the ALJ may reject an opinion if he states  
14 specific, legitimate reasons that are supported by substantial  
15 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44  
16 F. 3d 1435, 1463 (9<sup>th</sup> Cir. 1995).

17 In addition to the testimony of a nonexamining medical  
18 advisor, the ALJ must have other evidence to support a decision to  
19 reject the opinion of a treating physician, such as laboratory  
20 test results, contrary reports from examining physicians, and  
21 testimony from the claimant that was inconsistent with the  
22 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
23 751-52 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9<sup>th</sup>  
24 Cir. 1995).

25 Dr. Kelley's December 2007 opinion

26 Plaintiff alleges the ALJ erroneously gave more credit to the  
27 November 2006 opinion of examining physician A. Peter Weir, M.D.,  
28 than to the opinion of treating physician Kal Kelley, M.D., in

1 December of 2007. (Ct. Rec. 13 at 25-30.) Specifically, plaintiff  
2 alleges the ALJ should have credited Dr. Kelley's opinion  
3 "plaintiff is limited to sedentary work with handling and postural  
4 limitations."<sup>1</sup> (Ct. Rec. 13 at 25.) The Commissioner asserts the  
5 ALJ properly rejected Dr. Kelley's opinion. (Ct. Rec. 16-2 at 7-  
6 8.)

7 Dr. Kelley began seeing plaintiff on September 18, 2007,  
8 almost three years after onset. (Tr. 619.) With respect to  
9 assessed handling limitations, the ALJ points out plaintiff fails  
10 to show they lasted twelve months as required by the Act:

11 [plaintiff] originally injured her left shoulder in  
12 September 2004, but was released to full work duties  
13 by [PAC] Mr. Mapes in October 2004 at Exhibit 20F [a  
14 month before onset]. She later began complaining of  
15 numbness in both hands, worse on the right, and  
16 [treating physician] Dr. Artzis subsequently opined  
17 in March 2005 [four months after onset] at Exhibit 9F  
18 [Tr. 485] that, pending carpal tunnel surgery, the claimant  
19 was limited to sedentary work, pending convalescence. She  
20 subsequently underwent right carpal tunnel release in June of  
21 2005 and was released to  
22 return to work October 1, 2005 at Exhibit 9F, with  
23 no limitations noted. Based on these evaluations,  
24 there does not appear to be a 12-month period of  
25 disability related to either [CTS or a left shoulder]  
26 condition.

27 (Tr. 25-26.)

28 The ALJ appropriately relied on plaintiff's failure to meet  
the durational requirement when he rejected Dr. Kelley's  
contradicted opinion. The reason is specific, legitimate and  
fully supported by the record.

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Dr. Kelley assessed moderate, defined in the form as  
significant, interference in the ability to walk, lift, handle  
and carry. He assessed "restricted mobility, agility, or  
flexibility" with bending, climbing, crouching, kneeling,  
pulling, pushing and stooping. (Tr. 583.)

1 As noted by the Commissioner, the ALJ also rejected Dr.  
2 Kelley's opinion based on the opinion of examining physician Dr.  
3 Weir. (Ct. Rec. 16-2 at 7-8, referring to Tr. 26.) Dr. Weir notes  
4 plaintiff "was given a dish of small seeds of various sizes and  
5 was able to sort the seeds into groups according to size without  
6 difficulty" (Tr. 288). He assessed no manipulative restrictions,  
7 and specifically opined: "claimant is not limited in her ability  
8 to use her hands for grasping and manipulating, or for fine and  
9 dexterous movements" (Tr. 290).

10 The ALJ observes plaintiff began seeing Dr. Kelley after her  
11 regular physician, John Frlan, M.D., discharged her for missing  
12 appointments. (Tr. 19-20; Tr. 618.) Dr. Frlan expressed  
13 additional concerns: "[w]e have been giving her large amount[s] of  
14 pain pills and they just seem to increase and increase"; and he  
15 suspected plaintiff's abscesses indicated intravenous drug use.  
16 (Tr. 20, 25, 618-619.) At plaintiff's first appointment with Dr.  
17 Kelley, in September of 2007, she tested positive for THC,  
18 opiates, methadone, and oxycodone. (Tr. 620, 659.) Plaintiff's  
19 active use of substances is another reason Dr. Kelley's opinion  
20 was not relevant to the ALJ's determination of plaintiff's  
21 impairments without DAA.

22 As noted, plaintiff argues the ALJ improperly rejected Dr.  
23 Kelley's December 2007 opinion. The date of Dr. Kelley's opinion  
24 is not clear, however, because the final page, page four, of the  
25 GAU report (referred to by the ALJ and the parties) is missing  
26 from the record (Tr. 582-583). In his GAU report, Dr. Kelley  
27 assessed limitations resulting from lumbar disc disease, axonal  
28 injury at C6-C7, and right hip bursitis (Tr. 583). The ALJ refers

1 to Dr. Kelley's GAU evaluation "in October of 2007" limiting  
2 plaintiff to sedentary work due to "chronic back pain,  
3 hypothyroidism and hepatitis C." ((Tr. 21, 26, both citing Exhibit  
4 23F). Dr. Kelley's GAU assessment reveals: the report is stamped  
5 "received" in Colville on December 19, 2007, plaintiff is limited  
6 to sedentary work, and the assessed impairments are due to lumbar  
7 disc disease, axonal injury at C6-C7, hepatitis C and bursitis.  
8 (Tr. 582-583.) On October 15, 2007, Dr. Kelley assessed chronic  
9 back pain, hypothyroidism, and hepatitis C (Tr. 584), impairments  
10 the ALJ perhaps mistakenly felt were assessed by Dr. Kelley in  
11 December of 2007. Dr. Kelley's undated GAU assessment also fails  
12 to indicate the expected duration of the impairments. The missing  
13 final page normally contains this information. (See e.g., Tr.  
14 576, 580.) The ALJ's error if any appears harmless, however,  
15 since Dr. Kelley's opinion fails to meet the durational  
16 requirement, and the ALJ's other reasons to reject it are  
17 specific, legitimate and supported by substantial evidence.

18 The ALJ rejected Dr. Kelley's opinion based on his assessment  
19 of plaintiff's credibility (see below), Dr. Weir's opinion (more  
20 than two years after onset) that plaintiff was deconditioned but  
21 able to perform a wide range of light work, and, as noted, other  
22 treating physicians, including Dr. Artzis, released plaintiff to  
23 work after onset without limitations. (Tr. 26; cited at Tr. 20-22,  
24 25.)

25 To aid in weighing the conflicting medical evidence, the ALJ  
26 evaluated plaintiff's credibility. (Tr. 25-26.) Credibility  
27 determinations bear on evaluations of medical evidence when an ALJ  
28 is presented with conflicting medical opinions or inconsistency

1 between a claimant's subjective complaints and diagnosed  
2 condition. See *Webb v. Barnhart*, 433 F. 3d 683, 688 (9<sup>th</sup> Cir.  
3 2005).

4 It is the province of the ALJ to make credibility  
5 determinations. *Andrews v. Shalala*, 53 F. 3d 1035, 1039 (9<sup>th</sup> Cir.  
6 1995). However, the ALJ's findings must be supported by specific  
7 cogent reasons. *Rashad v. Sullivan*, 903 F. 2d 1229, 1231 (9<sup>th</sup>  
8 Cir. 1990). Once the claimant produces medical evidence of an  
9 underlying medical impairment, the ALJ may not discredit testimony  
10 as to the severity of an impairment because it is unsupported by  
11 medical evidence. *Reddick v. Chater*, 157 F. 3d 715, 722 (9<sup>th</sup> Cir.  
12 1998). Absent affirmative evidence of malingering, the ALJ's  
13 reasons for rejecting the claimant's testimony must be "clear and  
14 convincing." *Lester v. Chater*, 81 F. 3d 821, 834 (9<sup>th</sup> Cir. 1995).  
15 "General findings are insufficient: rather the ALJ must identify  
16 what testimony not credible and what evidence undermines the  
17 claimant's complaints." *Lester*, 81 F. 3d at 834; *Dodrill v.*  
18 *Shalala*, 12 F. 3d 915, 918 (9<sup>th</sup> Cir. 1993).

19 The ALJ gave clear and convincing reasons for his credibility  
20 assessment, some of which include failing to follow recommended  
21 courses of treatment, drug seeking behavior, activities  
22 inconsistent with the degree of impairment alleged, and  
23 inconsistent statements. (Tr. 25-26.) Each is fully supported.

24 Plaintiff failed to follow recommended courses of treatment.  
25 On March 6, 2007, providers report plaintiff attended counseling  
26 "sporadically" and failed to keep any of three scheduled  
27 appointments to evaluate the need for psychotropic medication.  
28 (Tr. 337, 444.) On March 26, 2007, Dr. Frlan noted plaintiff was

1 scheduled for follow up lab testing for hepatitis but had failed  
2 to have the tests drawn. (Tr. 591-592.) Plaintiff has engaged in  
3 drug seeking behavior. After entering into a pain contract with  
4 Dr. Frlan, she ran out of prescribed pain medication (dilaudid)  
5 early; Dr. Frlan refused to refill it. (Tr. 449, 451.) Similarly,  
6 on November 21, 2006, another treatment provider denied  
7 plaintiff's request for an early refill of hydrocodone. (Tr. 317.)

8 The Commissioner points out the ALJ relied on plaintiff's  
9 activities inconsistent with the degree of impairment claimed when  
10 he assessed credibility. (Ct. Rec. 16-2 at 8, citing Tr. 25.)  
11 Plaintiff's activities include attending college full time  
12 (4/18/05 at Tr. 234 and 6/17/05 at Tr. 478); working waiting  
13 tables (12/13/06 at Tr. 463); catering a large event (12/26/06 at  
14 Tr. 306 and 1/3/07 at Tr. 461), and helping remove a 200 pound  
15 canopy from a pickup truck (11/5/2006 at Tr. 364). (noted by the  
16 ALJ at Tr. 14, 16-18, 25-26.) Not relied on by the ALJ but also  
17 supporting his assessment is a note on June 14, 2007, indicating  
18 plaintiff has "been working at the body shop . . . [d]oing some  
19 walking and paperwork;" and in July of 2007, plaintiff took a  
20 river rafting trip and slept in a barn (Tr. 608, 614).

21 Plaintiff's inconsistent statements include denying drug  
22 abuse history to physicians even though a drug screen in September  
23 of 2007 was positive for marijuana, as the ALJ observes. (Tr.  
24 25); *compare* Tr. 582 (Dr. Kelley notes no current indication or  
25 history of alcohol or drug abuse), *with* Tr. 619 (on September 18,  
26 2007, Dr. Kelley observes plaintiff's urine test is positive for  
27 marijuana).

28 The ALJ's reasons for finding plaintiff less than fully

1 credible are clear, convincing, and fully supported by the record.  
2 See *Thomas v. Barnhart*, 278 F. 3d 947, 958-959 (9<sup>th</sup> Cir.  
3 2002)(proper factors include inconsistencies in plaintiff's  
4 statements, inconsistencies between statements and conduct, and  
5 extent of daily activities). Noncompliance with medical care or  
6 unexplained or inadequately explained reasons for failing to seek  
7 medical treatment also cast doubt on a claimant's subjective  
8 complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885 F.  
9 2d 597, 603 (9<sup>th</sup> Cir. 1989).

10 To the extent the ALJ rejected Dr. Kelley's contradicted  
11 2007 opinion limiting her to sedentary work based on handling and  
12 postural limitations, the ALJ's reasons are legitimate, specific,  
13 and supported by substantial evidence in the record. See *Lester*  
14 *v. Chater*, 81 F. 3d 821, 830-831 (9<sup>th</sup> Cir. 1995)(holding that the  
15 ALJ must make findings setting forth specific, legitimate reasons  
16 for rejecting the treating physician's contradicted opinion).

17 The ALJ is responsible for reviewing the evidence and  
18 resolving conflicts or ambiguities in testimony. *Magallanes v.*  
19 *Bowen*, 881 F. 2d 747, 751 (9<sup>th</sup> Cir. 1989). It is the role of the  
20 trier of fact, not this court, to resolve conflicts in evidence.  
21 *Richardson*, 402 U.S. at 400. The court has a limited role in  
22 determining whether the ALJ's decision is supported by substantial  
23 evidence and may not substitute its own judgment for that of the  
24 ALJ, even if it might justifiably have reached a different result  
25 upon de novo review. 42 U.S.C. § 405 (g).

26 Weighing opinions of mental health providers

27 Plaintiff argues the ALJ erred by rejecting the opinions of  
28 mental health treatments providers in favor of the testifying

1 psychologist's opinion. (Ct. Rec. 13 at 30-33.) According to the  
2 Commissioner, the ALJ is correct because "the evidence of lay  
3 therapist Mr. Rigg, as well as evidence from Plaintiff's other  
4 psychological treatment [providers], supports the notion that her  
5 mental limitations were related to her early stages of withdrawal  
6 from DAA at the time the assessments were made." (Ct. Rec. 16-2  
7 at 8, referring to Tr. 26.) The Commissioner argues these  
8 opinions, therefore, "have no place in assessing Plaintiff's  
9 mental limitations absent DAA, as the ALJ was charged to do[.]"  
10 (Id.)

11 The Commissioner is correct. The ALJ found plaintiff is  
12 disabled when DAA is included. The relevant inquiry became  
13 whether she would continue to be disabled if she stopped abusing  
14 drugs and/or alcohol.

15 The ALJ considered the testifying expert, W. Scott Mabee,  
16 Ph.D.'s opinion when trying to answer this question. Dr. Mabee  
17 pointed out the only mental health records are dated July 2006  
18 through July 2007 (Tr. 34, 689). His record review included an  
19 August 9, 2006, evaluation by Phyllis Rigg and a supervising  
20 psychologist (Tr. 34, referring to Tr. 266-268). Ms. Rigg notes  
21 drug and alcohol use is indicated and worsens all other conditions  
22 (Tr. 266-267). She opined abstinence would improve depression and  
23 anxiety (Tr. 266). Ms. Rigg assessed, among other disorders,  
24 amphetamine dependence in early remission by self-report. (Id.)  
25 The ALJ notes Ms. Rigg's evaluation is "just one month after  
26 [plaintiff's] completing inpatient treatment" (Tr. 26). Dr. Mabee  
27 observes this, too (Tr. 35). Plaintiff apparently completed  
28 treatment on July 30, 2006 (Tr. 265, 577).

1 Dr. Mabee points out plaintiff attended counseling  
2 sporadically and did not take psychotropic medication (Tr. 35). He  
3 assessed, when DAA is excluded, limitation in the ability to  
4 maintain concentration for extended periods (rated none to  
5 moderate) and to complete a normal workday and workweek without  
6 interruptions from psychologically based symptoms (rated none to  
7 moderate). He assessed moderate limitations in the ability to  
8 work in coordination with or proximity to others, interact  
9 appropriately with the public, get along with co-workers or peers,  
10 and respond appropriately to changes in the work setting (Tr. 690-  
11 691).

12 Plaintiff alleges the ALJ failed to provide specific and  
13 legitimate reasons supported by substantial evidence for rejecting  
14 the opinions of "plaintiff's therapist, Ms. Riggs, and the  
15 supervising psychologist at SCCS." (Ct. Rec. 13 at 33.) The ALJ  
16 relied on the opinion of Dr. Mabee, his assessment of plaintiff's  
17 credibility, plaintiff's failure to follow through with treatment,  
18 and the lack of treatment records when he assessed psychological  
19 limitations excluding DAA. The ALJ's reasons are both specific  
20 and legitimate, and  
21 supported by substantial evidence. The ALJ's assessment of the  
22 evidence of physical and mental impairment excluding DAA, and of  
23 plaintiff's credibility, is supported by the record and free of  
24 legal error.

#### 25 **B. Lay testimony**

26 Plaintiff contends the ALJ failed to properly weigh the lay  
27 witness testimony of plaintiff's friend, Elizabeth Olson. (Ct.  
28 Rec. 13 at 33-34.) The Commissioner responds that the ALJ cited  
"specific evidence, germane to the lay witness, which belied her  
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1 conclusion that Plaintiff could not work." (Ct. Rec. 16-2 at 9.)

2 The ALJ must take into account lay witness testimony, unless  
3 he or she "expressly determines to disregard such testimony and  
4 gives reasons germane to each witness for doing so." *Lewis v.*  
5 *Apfel*, 236 F.3d 503, 511 (9<sup>th</sup> Cir. 2001). An ALJ may reject lay  
6 testimony which conflicts with medical evidence. *Bayliss v.*  
7 *Barnhart*, 427 F.3d 1211, 1218 (9<sup>th</sup> cir. 2005).

8 The Commissioner is correct. The ALJ rejected Ms. Olson's  
9 opinion plaintiff could not work. The ALJ notes Ms. Olson's  
10 report is generally consistent with the medical record indicating  
11 plaintiff is able to perform sedentary to light exertional  
12 activities:

13 [Ms. Olson describes plaintiff as having] no  
14 problems with personal care . . . She is capable  
15 of light housekeeping, driving a car, shopping  
16 alone, cooking, reading. She attends weekly  
meetings and church. She can walk 2 miles and pay  
attention 30 minutes at a time. She is able to  
finish tasks.

17 (Tr. 25, referring to Exhibit 5E.)

18 The ALJ accepted the lay testimony of plaintiff's friend to  
19 the extent it was supported by other evidence in the record.  
20 He rejected her conclusion as inconsistent with the medical and  
21 other evidence, a reason germane to Ms. Olson's testimony. There  
22 is no error in the ALJ's assessment of the lay witness's opinion.

### 23 **C. RFC Assessment**

24 The ALJ assessed an RFC (excluding DAA) for a range of light  
25 work with a sit/stand option. He limited climbing, balancing,  
26 stooping, kneeling, crouching, and crawling to "occasionally."  
27 (Tr. 28.) The ALJ opined plaintiff "cannot do continuous  
28 strenuous gripping with either hand in work activities." Overhead

1 lifting with the left arm is limited to occasionally. The ALJ  
2 opined plaintiff needs a job with "limited contacts or job duties  
3 to be carried out essentially alone, but is capable of perfunctory  
4 social contact."

5 Plaintiff alleges the ALJ's RFC assessment (when DAA is  
6 excluded) is flawed because ALJ Gaughen failed to properly weigh  
7 the opinions of Dr. Kelley and mental health professionals. The  
8 Court has already addressed this argument.

9 Plaintiff alleges the RFC is also flawed because the ALJ  
10 "failed to acknowledge" that "Dr. [David] Henzler found arm  
11 impairments based on objective findings." (Ct. Rec. 13 at 35,  
12 referring to Tr. 588.) Dr. Henzler's report is dated January 3,  
13 2008 - - more than three years after onset. As indicated, the ALJ  
14 determined plaintiff fails to establish a 12 month period of  
15 disability related to either CTS or her left shoulder injury in  
16 September of 2004, a finding well supported by the record. The  
17 ALJ discusses Dr. Henzler's report, as well as other evidence,  
18 before assessing an RFC limiting overhead lifting with the left  
19 arm to "occasionally." (Tr. 26, 28.) It appears the ALJ fully  
20 took into account this evidence.

21 Plaintiff alleges the ALJ erred because he "did not consider  
22 all impairments, including those deemed not 'severe'" when  
23 assessing plaintiff's RFC. (Ct. Rec. 13 at 36-38.) The Court  
24 notes plaintiff's activities alone fully support the RFC. The ALJ  
25 did not err when he weighed the evidence at step two, nor when he  
26 assessed plaintiff's RFC.

27 With respect to mental impairments, plaintiff alleges the ALJ  
28 failed to incorporate all of Dr. Mabee's assessed limitations into

1 the RFC. (Ct. Rec. 13 at 37-38.) Specifically, she alleges the  
2 ALJ should have included limitations in the ability to 1) maintain  
3 attention and concentration, 2) complete a normal work day/week  
4 without interruptions from psychologically based symptoms, and 3)  
5 perform at a reasonably consistent pace without an unreasonable  
6 number and length of rest periods, all at a level of "no  
7 significant to moderate" limitation. Plaintiff argues the ALJ  
8 should have included a moderate limitation in the ability to  
9 respond appropriately to changes in the work setting, as assessed  
10 by Dr. Mabee. (Ct. Rec. 13 at 37-38, citing Tr. 26, 55-56, 689-  
11 692.)

12 Dr. Mabee's more dire limitations are unsupported by the  
13 record, unlike the assessed RFC. During the period of alleged  
14 disability, plaintiff attended college full time, worked waiting  
15 tables and catering (though at less than SGA levels), and engaged  
16 in hobbies such as river rafting. The Court finds the RFC  
17 assessment is without error.

18 **D. VE's testimony**

19 Plaintiff argues the VE's testimony "arguably" conflicted  
20 with the DOT and the ALJ failed to have her explain the conflict.  
21 (Ct. Rec. 13 at 39-40.) The VE testified a person with  
22 plaintiff's limitations could perform her past relevant work as a  
23 secretary, insurance clerk, and administrative clerk, when DAA is  
24 excluded (Tr. 56-57). Plaintiff alleges:

25 The VE testified that all three jobs required  
26 frequent reaching, handling and fingering, however  
27 the ALJ limited plaintiff to no work which requires  
28 continuous strenuous gripping/handling with either  
hand. Tr. 28, 55-56. The VE did not provide any  
explanation for this arguable contradiction, contrary  
to law.

1 (Ct. Rec. 13 at 39-40.)

2 The Court agrees with the Commissioner: frequent handling of  
3 objects, such as paper, does not require continuous strenuous  
4 gripping. (Ct. Rec. 16-2 at 11.) There was no conflict between  
5 the VE's testimony and the DOT.

6 **CONCLUSION**

7 Having reviewed the record and the ALJ's conclusions, this  
8 Court finds the ALJ's decision is free of legal error and  
9 supported by substantial evidence..

10 **IT IS ORDERED:**

11 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 16**) is  
12 **GRANTED.**

13 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 12**) is  
14 **DENIED.**

15 The District Court Executive is directed to file this Order,  
16 provide copies to counsel for Plaintiff and Defendant, enter  
17 judgment in favor of Defendant, and **CLOSE** this file.

18 DATED this 21<sup>st</sup> day of December, 2009.

19 s/ James P. Hutton  
20 JAMES P. HUTTON  
UNITED STATES MAGISTRATE JUDGE